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IN THE MATTER OF THE APPLICATION OF
CORONADO UTILITIES, INC., FOR A
CERTIFICATE OF CONVENIENCE AND
NECESSITY TO PROVIDE WASTEWATER
SERVICE IN PINAL COUNTY, ARIZONA.

DOCKET NO. SW-04305A-05-0086

IN THE MATTER OF THE APPLICATION OF
CORONADO UTILITIES, INC., AN ARIZONA
CORPORATION, FOR AUTHORITY TO ISSUE
SHORT AND LONG-TERM DEBT
INSTRUMENTS IN CONNECTION WITH
FINANCING THE ACQUISITION OF THE
WASTEWATER UTILITY PLANT OF BHP
COPPER, INC. AND CONSTRUCTING
IMPROVEMENTS THERETO.

DOCKET NO. SW-04305A-05-0087

**STAFF MEMORANDUM RE: BHP'S
STATUS AS A PUBLIC SERVICE
CORPORATION**

On July 7, 2005, the Administrative Law Judge ("ALJ") ordered Staff to file a legal memorandum that addresses the question whether BHP Copper, Inc. ("BHP") is a public service corporation and whether BHP has an on-going obligation to continue to provide sewer service whether it is, or is not, a public service corporation. On August 2, 2005, the ALJ ordered that the above memorandum should be filed by August 31, 2005.

FACTS

BHP is a mining company. One of its largest copper mines is located in San Manuel, Arizona. The San Manuel mine was originally operated by Magma Copper until 1996, when it was acquired by BHP. During the time the copper mine was in operation, BHP employees settled in the area. Many purchased homes and continued to live in San Manuel upon retirement. For the entire period of the mine's operation and through the present, the mining company (first Magma, then BHP) provided sewage utility services to the residents of San Manuel and will continue to do so until January, 2006. On the Arizona Department of Commerce Community Profile for San Manuel, BHP is listed as the sewer utility. Currently, BHP is in the process of selling its sewage treatment plants to

1 Coronado Utilities, Inc. ("Coronado" or "Company") Coronado plans to provide sewage service to
2 the area beginning in January, 2006.

3 DISCUSSION

4 I. BHP is a public service corporation

5 A. BHP is a public service corporation because it meets *Serv-Yu* criteria for public 6 service corporations.

7 In *Natural Gas Serv. Co. v. Serv-Yu Co-op*, 70 Ariz. 235, 237-38, 219 P.2d 324, 325-26 (Ariz.
8 1950), the Supreme Court of Arizona listed the following factors to be considered when determining
9 whether a company is a public service corporation:

10 "(1) what the corporation actually does; (2) a dedication to public use; (3)
11 articles of incorporation, authorization, and purposes; (4) dealing with the
12 service of a commodity in which the public has been generally held to
13 have an interest; (5) monopolizing or intending to monopolize the territory
14 with a public service commodity; (6) acceptance of substantially all
15 requests for service; (7) service under contracts and reserving the right to
16 discriminate is not always controlling; (8) actual or potential competition
17 with other corporations whose business is clothed with public interest."

18 *Id.* at 3. The *Serv-Yu* Court's analysis made clear that it is not one single factor that determines
19 whether a company is a public service corporation, but rather a combination of factors such as those
20 listed above. Thus, BHP would not have to satisfy every factor in order to be considered a public
21 service corporation.

22 BHP's main business may be the mining of copper. Its articles of incorporation may say
23 nothing about BHP providing sewage service. The company's intent or the intent of its owners and
24 operators may never have been to provide sewage service. Even so, the company may still be found
25 to be a public service corporation. In *Serv-Yu*, the court stated that "[t]he facts govern. It does not
26 solely depend upon the wishes and the declarations of the owner." *Id.* at 327. Even if the company
27 does not expressly hold itself out as a public service corporation, which BHP does not, the court
28 stated that if the company "dedicated itself to public utility service on behalf of a substantial part of
the public and within a substantial area so as to make its business a matter of public concern, welfare

1 and interest; consequently it is a public utility.” *Id.* at 329. See also *Grever v. Idaho Telephone Co.*,
2 94 Idaho 900, 499 P.2d 1256 (1972); *Lockwood Water Users Ass’n v. Anderson*, 168 Mont. 303, 542
3 P.2d 1217 (1975). BHP’s sewage treatment plant serves a “substantial part of the public”- it serves
4 the entire community of San Manuel. Its operation is therefore a matter of public concern, and the
5 company is a public utility. BHP is also “dealing with a commodity in which the public has generally
6 been held to have an interest”- sewage service. It certainly monopolizes the territory as far as
7 providing sewage services- it is the only provider of this service for San Manuel.

8 As far as the other *Serv-Yu* factors, there is no indication that BHP has ever refused to provide
9 sewage services to anyone in the San Manuel community, further pointing to its involvement with the
10 public and its existence as a public utility. BHP does not have service contracts with members of the
11 San Manuel community that it provides service to and it has not reserved the right to refuse service.
12 The existence of contracts could perhaps strengthen a company’s contention that it did not hold itself
13 out as ready to serve the public, generally. *Id.* at 327. However, these contracts are not present in
14 BHP’s case and the Company did not indicate that it uses any discriminatory criteria when it decides
15 whom to serve. There is no indication that BHP competes with other companies “whose business is
16 clothed with public interest.” However, BHP currently has a monopoly on the sewage utility for San
17 Manuel.

18 When the *Serv-Yu* factors are applied to the facts and circumstances present here, it becomes
19 clear that BHP could very well be considered a public service corporation.

20 **B. BHP is a public service corporation because it meets constitutional criteria for**
21 **public service corporations.**

22 **1. BHP provides sewer service to the public.**

23 The Arizona Constitution states “[a]ll corporations other than municipal engaged in
24 collecting, transporting, treating, purifying and disposing of sewage through a system, for profit shall
25 be deemed public service corporations.” Ariz. Const. art. 15, § 2. BHP is not a municipal
26 corporation. Although BHP’s main business in San Manuel is the mining of copper and the
27 Company appears to be providing sewer services only as an incidental to its main business, it is also
28 true that BHP is the only sewer service provider in the area. Both the community profile on the

1 Arizona Department of Commerce website and the community profile provided for San Manuel on
2 the Arizona Daily Star's webpage list BHP as the sewer utility provider, and group it in the 'Utilities'
3 category, along with telephone and electricity providers. (Available at <http://www.azcommerce.com>
4 and <http://regulus.azstarnet.com/azcommunityprofiles>). Any resident of San Manuel, whether old or
5 new, who needs access to or repair of sewer services would therefore contact BHP. This makes BHP
6 the *de facto* sewer service provider for San Manuel.

7 Additionally, BHP serves the public, not a defined and limited sector of the public. In *Ariz.*
8 *Corp. Comm. v. Nicholson*, 108 Ariz. 371, 497 P.2d 815 (Ariz. 1972), the Supreme Court of Arizona
9 found that the fact that the owners of a mobile trailer park provided water to their tenants did not
10 make them a public service corporation. However, in *Nicholson*, even though the trailer park was
11 open to the general public, as is the community of San Manuel, each tenant was screened and had to
12 meet certain requirements. *Id.* at 817. The trailer park owners were therefore not serving the public
13 at large, but rather a small, selected segment of that public, and the court found that to be
14 determinative of whether they could be classified as a public service corporation. Such is not the
15 case here. Here there are no special requirements for limiting the number of people who move to San
16 Manuel, and those who choose to do so are led to believe that BHP will provide them with sewer
17 service. And while the trailer park in *Nicholson* had, at most 425 units (with only 250 in use), San
18 Manuel is a growing community of 1250 residences and 60 businesses.

19 **2. BHP provides sewer service for profit.**

20 In order to be a public service corporation, BHP must be providing sewer service "for profit."
21 Ariz. Const. art. 15, § 2. BHP is not incorporated as a non-profit or not-for-profit corporation. BHP
22 is charging customers for sewer service. If BHP were to continue to provide sewer service in San
23 Manuel, it could raise its sewer rates and add additional customers.

24 However, the strongest argument against determining that BHP is a public service corporation
25 is based on the fact that it neither operates its sewage plant as a separate business entity, nor seeks to
26 make a profit from the sewage service it provides incidental to its copper mining operations. If BHP
27 did operate its sewage plant as a separate business entity, there would be a stronger argument that it is
28

1 a public service corporation. (See *Trico Electric Co-op. Inc. v. Corp. Comm'n*, 86 Ariz. 27, 339 P.2d
2 1046 (Ariz. 1959)). There is no contention that the sewage plant is a separate business entity here.

3 However, the fact that BHP did not seek a profit from its sewage service operations is not
4 dispositive. In *Serve-Yu*, the court found that Act 90 of the Arizona Revised Statutes of the first state
5 legislature "subjected public service corporations to regulation when operated 'for compensation'."
6 *Nat. Gas Co. v. Serv-Yu Co-op.*, 70 Ariz. 235, 242, 219 P.2d 324, 329 (Ariz. 1950). BHP charged the
7 businesses and inhabitants of San Manuel not a substantial fee, but a fee nonetheless, in exchange for
8 providing sewage service. Thus, just because BHP did not financially profit from its sewer plant
9 operations, that should not automatically render it not a public service corporation.

10 Therefore, BHP should be found to be a public service corporation because it is a for profit,
11 non-municipal corporation that is the sole provider of sewer services for San Manuel, it serves a
12 substantial section of the public and it charges customers for its sewer services, even if the rates
13 charged are not sufficient to make the operation profitable to BHP.

14 **II. BHP should continue to provide sewer service to San Manuel**

15 If BHP is found to be a public service corporation, it must continue to provide service until it
16 obtains the Commission's permission to stop doing so. Ariz. Admin. Code R14-2-602(D)(1) (1982).
17 If it simply stops, the community of San Manuel will be left with no sewage service provider and
18 therefore find itself facing public health and safety hazards that it should not have to deal with.

19 Further, even if BHP did not originally announce an intention to act as a public service
20 corporation, it never obtained a Certificate of Convenience and Necessity ("CC&N") and never
21 submitted itself to the Commission's regulations, it acted as the sole sewage provider in the area and
22 led the members of the community to believe it was their sewer utility provider. It behaved as a
23 public utility provider would, and even if it is found not to be a public service corporation, it still has
24 an obligation to the public, an obligation that it has voluntarily assumed. Should it be allowed to
25 dispose of the obligation at will, it would wreak havoc on the lives of innocent people who were
26 never aware that they should have been looking for other sewage service providers all along.

27 ...

28 ...

1 CONCLUSION

2 Although BHP may argue that it is not providing sewer service to customers "for profit," BHP
3 satisfies a great number of the criteria used to determine whether a business entity is a public service
4 corporation. Thus, it is Staff's position that BHP should be found to be a public service corporation
5 in the business of providing sewer utility services to San Manuel. As such, BHP should continue to
6 provide sewer service to San Manuel until a sale or transfer is completed to a different public service
7 corporation which has been found to be suitable by the Commission.

8 However, even if BHP is found not to be a public service corporation, it should still continue
9 to provide sewer service to San Manuel until a suitable replacement provider assumes operations.
10 Allowing BHP to stop providing sewer services to the community without a suitable replacement will
11 result in severe public health and safety hazards.

12
13 RESPECTFULLY SUBMITTED this 31st day of August, 2005.
14

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19 The original and thirteen (13) copies
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